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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 986

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

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No. ———

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the final judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on June 13, 1967.

CITATIONS TO OPINIONS BELOW

The order of the Supreme Court of Florida, dated October 11, 1967, denying petition for certiorari is not yet officially reported, appears in the Record at page 451, and is printed in Appendix A hereto, *infra.*

The opinion of the District Court of Appeal, Third District of Florida, dated May 9, 1967, is officially reported at 199 So. 2d 122, appears in the Record at page 438, and is printed as Appendix B hereto, *infra.*

The Corrective Final Decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida, dated April 19, 1967, is unreported, appears in the Record at pages 412-420 and is printed in Appendix C hereto, *infra.*

The Supplemental Final Decree of the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida dated September 9, 1963, in the case of *Margaret Morton vs. Richard Morton* is unreported, appears in the Record at pages 21-24 and is printed in Appendix D hereto, *infra.*

JURISDICTION

The judgment of the District Court of Appeal, Third District of Florida was entered on June 13, 1967. A timely petition for certiorari was filed in the Florida Supreme Court on August 8, 1967 which was denied by the Supreme Court of Florida by Order dated October 11, 1967, R. 451, Appendix A hereto, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) since a right, privilege and immunity was claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitu-

tion, the real property interests of a non-resident spouse may be levied upon by a state court to satisfy an alimony award where (1) the spouse has never appeared or been personally served with process in the alimony proceedings, (2) no seizure or attachment of the property occurred until more than one year subsequent to the entry of the alimony award, and (3) notice that the real property might be proceeded against was contained in a constitutionally inadequate constructive notice of the alimony claim?

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In April 1962, respondent, Margaret Morton, instituted suit in the Circuit Court for Sarasota County, Florida against her non-resident husband, Richard Morton, for alimony unconnected with divorce. No personal service of process was obtained upon the husband and he made no appearance in the action. In August of that year she

amended her complaint to seek in the alternative, alimony unconnected with divorce or, divorce and alimony.[1] Commencing on September 20, 1962, process was published in a Sarasota newspaper once a week for four weeks. The published process (R. 75) a copy of which, together with the Second Amended Complaint was mailed to the non-resident husband in Jackson, Mississippi, contained the advice that: "Plaintiff is proceeding against the following described real property * * *".
Thereafter followed a legal description of the property here involved, which is a complex of apartment buildings located more than 150 miles from Sarasota, Florida on Miami Beach, Dade County, Florida and which will be referred to as Morton Towers.[2]

The Second Amended Complaint sought the appointment of a receiver to take possession of the husband's assets in Florida, and sought orders of sequestration and garnishment of his property. No such orders were ever obtained. No personal service of process was ever obtained upon the husband, Richard Morton, and he made no appearance in the litigation.

On October 4, 1962, Lawrence Morton, Richard Morton's father, pursuant to a power of attorney which had

[1]The Sarasota divorce court Record appears in the original record filed herewith as Defendant's Exhibit #2, and has not been paginated by the clerk below. Pertinent portions of this Record have therefore been reproduced in Appendices D, E and F hereto for the convenience of the Court.

[2]Respondent claimed no pre-existing ownership, equitable or legal, in the property in question, but sought to have her husband's interest in the Morton Towers property subjected to her claimed right to alimony and child support. She did, however, claim a pre-existing ownership in certain other property, described in her amended complaint and in her published process, which property, consisting of a private residence, is not here involved.

been granted to him by his sons and their spouses, including Richard Morton and respondent, Margaret Morton, conveyed to petitioner, Wheatland Hills Corp., the undivided eight per cent interests in the Morton Towers property of each of his three sons.[3] The capital stock of petitioner was then issued to Richard Morton and his two brothers.

On September 4, 1963 the Sarasota Circuit Court granted to respondent an *ex parte* divorce (R. 19) from her husband and on September 9, 1963 awarded her lump sum alimony and child support in the sum of $450,000.00 payable in ten equal annual installments. (R. 21; Appendix D hereto, *infra*) Attorneys' fees, costs and temporary alimony were awarded to her in the sum of approximately $100,000.00. These sums were made a "special equitable lien" (R. 22) upon the husband's interest in the Morton Towers property and upon ". . . all other real and personal property of the Defendant of whatsoever nature located within the State of Florida." (R. 22) These orders make clear that they were not based upon personal jurisdiction over the defendant, although the decree of September 9, 1963, which awards alimony to the wife, is in the form of a personal judgment. On August 25, 1964, (Appendix E hereto) and October 5, 1964, (Appendix F hereto) more than one year *after* the alimony judgment the Sarasota court, for the first time, entered orders purporting to take the Morton Towers property into *custodia legis*.

In summary, the Sarasota court never exercised per-

[3]A complete history of the financial and ownership arrangements regarding the Morton Towers property is contained in the Stipulated Facts. (R 193-197).

sonal jurisdiction over the defendant-husband. It did not purport to seize his property or to take the property into the custody of the court until long *after* the alimony judgment was entered.

With the Sarasota alimony judgment, respondent attempted to levy on the Morton Towers property. Petitioner brought this suit in the Circuit Court for Dade County, Florida to enjoin the levy on the grounds, *inter alia*, that the Sarasota Court had acquired no jurisdiction over the person of Richard Morton or over the Morton Towers property, and that the judgment for alimony was constitutionally void for lack of jurisdiction. Respondent asserted that the Sarasota Court had jurisdiction to enter the alimony decree and that the conveyance of the property to petitioner was of no consequence unless petitioner was a bona fide purchaser without notice of the Sarasota proceedings. The Dade County court in its final decree[4] held:

> "An absconding father and husband, who avoids personal service by fleeing the jurisdiction of the courts of this State, leaving behind real property within the jurisdiction of this State, may thus escape personal liability for the payment of support and alimony to the deserted wife and children. Not so the property within the State; it remains subject to the processes of our courts and may be seized and sold to provide support for the abandoned wife and children.

[4]The emotionally charged language in this decree, *e.g.* "absconding," "fleeing," "mockery," etc. are unsupported by the record and are, in fact, not true but indicate the difficulties in obtaining due process for a non-resident husband. In this case, however, such language may be attributable to the fact that the court adopted as its decree the language prepared and submitted by the wife's counsel, including the colorful, but inaccurate descriptions of the husband.

"The fleeing husband does not escape with his real property by the simple device of forming a corporation, after leaving the State, to which he conveys the title in exchange for the capital stock of the corporation. The courts of this State and their processes are not impotent in the face of this mockery. It is obvious that the courts of this State have the power to appropriate the absent husband's property to the payment of his obligation for the support of his wife and children, provided proper procedures are adopted to accomplish this end.

"In *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565, it is pointed out by the Supreme Court of the United States, in speaking of the power of state courts, that "it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens", and this may be accomplished by substituted service by publication 'where the property is once brought under the control of the court by seizure or some equivalent act' ".

"Service by publication was accomplished in this cause and notice of the proceedings was received by Richard and the order requiring him to appear *specifically described the property against which Margaret was proceeding in said divorce suit*, giving to Richard full notice that it was the purpose of the suit to appropriate this property to the satisfaction and payment of the claims due her and her children for support.

"In *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090, the court said that the 'seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice, which *warns the defendant that one of the purposes of the proceeding is the sequestration of the land*'. This principle is cited with approval by the District Court of Appeal of Florida, Third District, in the case of *Webb v. Webb*, (1963) 156 So. 2d 698, 701.

"Again, in *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684, it was pointed out that the husband was a non-resident over whom the court did not obtain jurisdiction. However, the court held that since the complaint and the published notice to the defendant husband contained a particular description of the land sought to be appropriated, such notice was equal to a sequestration of the land.

"The amount awarded to Margaret, and the creation of a lien upon the property for the payment of the award, are matters which are finally concluded in the proceedings in the Twelfth Judicial Circuit. This Court is bound by those adjudications." (Emphasis supplied).

The Dade County Circuit Court ordered the undivided eight per cent interest in Morton Towers acquired by petitioner from Richard Morton sold at public auction to

satisfy the Sarasota Court's awards for alimony, child support and attorneys' fees.

Petitioner appealed to the District Court of Appeal of Florida, Third District which affirmed the Dade County Circuit Court, holding:

> "The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be subjected to the satisfaction of the claim for alimony and child support." (Opinion dated May 9, 1967. (R. 438)

Petitioner then applied to the Supreme Court of Florida for a writ of certiorari to review the decision of the District Court of Appeal. This petition was denied without opinion. (R. 451; Appendix A hereto *infra.*).

RAISING THE FEDERAL QUESTION

Petitioner in its complaint in the Circuit Court for Dade County, Florida asserted that the Sarasota judgment was void for failure to comply with the due process requirements of the XIV Amendment, United States Constitution (R. 8, 9). The Dade County Circuit Court clearly considered the federal constitutional question in its final decree. (R. 416).

Petitioner appealed to the District Court of Appeal of Florida, Third District, preserving the federal question in the following manner:

"POINT II

SEIZURE OF THE RES IS REQUIRED BY FLORIDA STATUTES AND THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT IN QUASI IN REM ACTIONS OF THE TYPE HERE INVOLVED." (Petitioners Brief in Florida District Court of Appeal, Third District, p. 11, 15)."

After the District Court of Appeal affirmed the trial court, petitioner applied to the Supreme Court of Florida to review the decision of the District Court of Appeal. Petitioner asserted the federal question in its petition to that court.[5] Although the federal question did not, under Florida procedure, constitute an independent basis for review by the Florida Supreme Court, the petitioner did exhaust all possibilities for review of the decision within the Florida system. cf. *Nash v. Florida Industrial Commission*, fn. 1, No. 48, Oct. Term 1967 (decided Dec. 5, 1967).

REASONS FOR GRANTING THE WRIT

This case involves an important and substantial issue regarding one of the most basic elements of Due Process of Law, a court's jurisdiction to enter a valid judgment affecting the property of a non-resident defendant who has neither appeared nor has been personally served with process.

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[5]"The decision of the court below is, in addition, in violation of the due process clause, Amendment XIV, United States Constitution, Pennoyer v. Neff, 95 U.S. 714 (1873); Pennington v. Fourth National Bank, 243 U.S. 269 (1917) and Section 1, Declaration of Rights, Florida Constitution." (Page 8, Petition to Florida Supreme Court).

The issue here raised concerns due process requirements which this Court *has* previously considered and *has* established pursuant to the Fourteenth Amendment of the United States Constitution. Petitioner submits, however, that these principles have *not* been followed by most State courts and lower federal courts when ruling upon the precise question here involved, and that the present case marks the addition of the State of Florida to those jurisdictions that steadfastly and consistently refuse to adhere to the constitutional principles enunciated by this Court. The grant of certiorari is therefore both appropriate and essential to halt this flouting of long-established due process requirements.

The question presented by this petition is one of the most common, garden variety species that daily arises in that rapidly expanding class of litigation — divorce and alimony. That question is to be found in the context of what this Court has described as a divisible and *ex parte* divorce, the defendant spouse being a non-resident of the forum state and not having made an appearance in the case or been personally served with process. In that situation the forum court does obtain jurisdiction, through constructive service upon the absent spouse, to sever the marital status and to render a valid judgment of divorce. But this Court has made clear that such constructive service on the non-resident spouse does not suffice, constitutionally speaking, to confer jurisdiction on the forum court to render a personal judgment compelling that spouse to pay alimony. "The result in this situation is to make the divorce divisible — to give effect to the . . . [forum] decree insofar as it affects marital status and to make it ineffective on the issue of alimony." *Estin* v. *Estin*, 334

U.S. 541, 549 (1948). See also *Williams* v. *North Carolina*, 317 U.S. 287 (1942); *Id.*, 325 U.S. 226 (1945); *Armstrong* v. *Armstrong*, 350 U.S. 568 (1956); *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). A valid alimony decree, in short, must be predicated upon an *in personam* jurisdiction acquired through personal service or voluntary appearance.

In this instance, therefore, Florida did not acquire jurisdiction over the non-resident husband, Richard Morton, for purposes of awarding alimony to the wife, the service on the husband having been purely constructive in nature. And it would follow that the effort to ground jurisdiction over the absent husband's property in Florida *solely* on the basis of the reference to and description of that property in the constitutionally inadequate notice of the alimony claim can give Florida no greater jurisdiction over the property than it had over the alimony claim.

True enough, Florida could have had jurisdiction — had such jurisdiction been invoked — to deal with the property within its borders regardless of the residence or presence of the owner. And such jurisdiction could have been invoked as an adjunct to an alimony claim not otherwise enforcible under the "divisible divorce" decisions of this Court. But to invoke that jurisdiction over the property, even to the extent of the alimony claim, requires compliance with certain constitutional requirements established by this Court, requirements which the Florida courts and a host of other courts have repeatedly ignored.

The basic constitutional requirements in this type of situation were set forth in *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917), involving an effort by an

Ohio court to enforce an obligation of an absent husband to pay alimony by attaching the husband's bank account in Ohio. Speaking for the Court, Mr. Justice Brandeis wrote (243 U.S. at 272):

> "The only essentials to the exercise of the state's power are presence of the res within its borders, *its seizure at the commencement of proceedings*, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, — that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized." [Emphasis added.]

These constitutional "essentials" have never been altered or lifted by this Court, the *Pennington* rule having been cited with approval in *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 at 419, n. 6 (1957); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 at 443, n. 19 (1951); and *Propper* v. *Clark*, 337 U. S. 472 at 488 (1949).

It is the second of the *Pennington* "essentials," the "* * * *seizure* at the commencement of proceedings * * *," which was not complied with in the present case. Indeed, the property here involved was never seized prior to the divorce judgment or the alimony award; the property was not even purportedly seized by the divorce court until more than a year after the divorce and alimony judgment.[6]

[6]The Sarasota Court first entered orders purporting to seize and bring the Dade County realty into the custody and control of the court over a year *after* the alimony judgment was entered. "It is the purpose

The requirement of seizure of property specified in *Pennington* as a Due Process essential, stems, of course, from *Pennoyer v. Neff*, 95 U.S. 714 (1878):

> "Substituted services by publication or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken *where property is once brought under the control of the court by seizure or some equivalent act.* The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that *its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.* Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or when the public is a party, to condemn and appropriate it for public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose." 95 U.S. at 727 (Emphasis supplied).

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of this order * * * to take into custodia legis the above-described res * * *." Temporary Restraining Order dated August 25, 1964. Appendix F hereto, *infra*. Order dated October 5, 1964, Appendix F hereto, *infra*.

The type of proceeding here involved, in which a purely personal claim for alimony is asserted against the defendant, to be satisfied from the defendant's property, is termed quasi in rem[7] and *seizure* of the property has been held by this Court in *Pennoyer* and *Pennington* to be an essential requirement of due process of law, in such proceedings.

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[7]There are two types of proceedings which are called quasi in rem. These are set forth in the Restatement of Judgments, § 32, Comment a, as follows:

> "Proceedings quasi in rem are of two types. In the first type the plaintiff *asserts an interest in property* and seeks to have his interest established as against the claim of a designated person or designated persons. In this type are included actions to recover possession of land or to establish the title to land, such as an action of ejectment, or one to quiet title or to remove a cloud on title, where the court has jurisdiction to give the relief asked because of its power over the land, even though it has no power over the adverse claimant. Of the same type is an action to foreclose a mortgage. If the court has jurisdiction over the person of the defendant as well as over the property, a judgment may be rendered which binds the defendant personally as well as his interest in the property. (See § 3, Comments b and c)."
>
> "In the second type of proceeding quasi in rem the plaintiff does not assert that he has an interest in the property, but *asserts a claim against the defendant personally*, and seeks to compel to the satisfaction of his claim the application of property of the defendant, by attachment or garnishment." (Emphasis supplied)

In the first type of quasi in rem jurisdiction, the plaintiff claims a pre-existing interest in the property and by filing his complaint tenders the property to the court for the exercise of its jurisdiction. Service by publication on the defendant is sufficient without any act of seizure on the part of the court itself. The claim sought to be litigated involves the title to the property and pertains exclusively to the property itself. The second type of quasi in rem jurisdiction is the type in which the debt sought to be enforced is unrelated to the property sought to be brought into custodia legis as the foundation for a money judgment. In this type of action the court must take some affirmative action to take control of the property. *Pennoyer v. Neff, supra.*

In the years since *Pennoyer* and *Pennington* however, the due process requirement of *seizure* of property where a claim for alimony is made has been honored in the breach rather than in the observance by state courts, when dealing with the question of alimony, resulting in a conflicting and chaotic body of law among the states upon these *federal* constitutional principles.[8]

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[8]A recent Annotation upon the precise issue raised herein appears in the American Law Reports, 3rd, 10 ALR 3d 212 (1966). The editor there states:

> "The Supreme Court's language in the Pennoyer Case as to bringing the property within the court's control by attachment or an equivalent act 'in the first instance'; and its statement in the Pennington Case that one essential of due process is 'seizure at the commencement of the proceedings' have not been literally followed by any court. The state courts and lower federal courts have held that due process is satisfied in in rem actions by seizure before the entry of final judgment, by a specific description of the property proceeded against, and even without prejudgment seizure or specific description." 10 ALR 3d at 215.

This Annotation does not distinguish between those cases where the resident spouse claims a pre-existing interest in the property and seeks its division, and those cases where the resident spouse, as here, claims no pre-existing interest in the property, but merely seeks to have it applied to the personal claim for alimony.

The following cases are all cases of the latter type, i.e. no pre-existing interest in the property is claimed:

(a) Cases in which a legal seizure not at the commencement of proceedings but prior to final decree, has been held sufficient to satisfy due process:

Connecticut: *Pezas v. Pezas*, 151 Conn. 611, 201 A.2d 192 (1964); Georgia: *Jackson v. Jackson*, 164 Ga. 115, 137 S.E. 827 (1927); Missouri: *State ex rel. Nelson v. Williams*, 249 S.W. 2d 506 (Mo. App. 1952); New Jersey: *Maloney v. Maloney*, 12 N.J. Misc. 397, 174 A. 28 (1934); New York: *Geary v. Geary*, 272 N.Y. 390, 6 N.E. 2d 67 (1936).

(b) Cases in which courts have held that *no* legal seizure is required and that a description of property is sufficient in order to grant alimony from property in which the spouse claims no pre-existing interest:

Arkansas: *Allen v. Allen*, 126 Ark. 164, 189 S.W. 841 (1916); Georgia: *Forrester v. Forrester*, 155 Ga. 722, 118 S.E. 373 (1923); *Jackson v. Jackson*, 164 Ga. 115, 137 S.E. 827 (1927); *Carter v. Bush*,

This cavalier treatment of the requirement of seizure and the rationale for its demise were expressed in the "Corrective Final Decree" of the Circuit Court below, where it is stated, "* * * seizure of land in such a case is little more than a form." Appendix C hereto, p. 5.

In substituting their own notions of due process for the principles established by this Court, some state courts have evolved the doctrine, adopted in this case by the Courts below as the law of Florida, that a published notice of suit or in the language of *Pennoyer* "substituted service by publication * * *," which contains a description of property intended to be proceeded against is sufficient, of itself, to satisfy the federal due process requirement of seizure in an *ex parte* divorce where alimony is sought, even though the claim is a purely personal claim which is sought to be satisfied from the property, and does *not* in

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216 Ga. 429, 116 S.E. 2d 568 (1960); *Cureton v. Cureton*, 218 Ga. 88, 126 S.E. 2d 666 (1962); Illinois: *Wilson v. Smart*, 324 Ill. 276, 155 N.E. 288 (1927); Iowa: *Harshberger v. Harshberger*, 26 Iowa 503 (1868); Kansas: *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090 (1896); North Carolina: *Bailey v. Bailey*, 127 N.C. 474, 37 S.E. 502 (1900); *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920); Ohio: *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684 (1929); Pennsylvania: *Reid v. Reid*, 28 Pa. D. & C. 2d 26 (1961); Tennessee: *Wilson v. Andrew*, 213 Tenn. 173, 375 S.W. 2d 650 (1963); Vermont: *Wilder v. Wilder*, 93 Vt. 105, 106 A. 562 (1919).

(c) Cases which have held that no seizure prior to judgment and no description of property are required to subject property to a personal claim for alimony although no pre-existing interest in the property is asserted:

Florida: *Burkhart v. Circuit Court of Eleventh Judicial Circuit*, 146 Fla. 457, 1 So. 2d 872 (1941); Iowa: *Twing v. O'Meara*, 59 Iowa 326, 13 N.W. 321 (1882); Kansas: *Campbell v. Campbell*, 144 Kan. 247, 58 P. 2d 1133 (1936); North Dakota: *McLean v. McLean*, 69 N.D. 665, 290 N.W. 913 (1940); Ohio: *Dexter v. Taylor*, 47 Ohio Ops. 398, 107 N.E. 2d 402 (1951).

any manner involve the title to the property.[9] The one-sentence opinion of the District Court of Appeal below states this proposition:

> "The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be

[9]The District Court of Appeal below relied upon three such decisions: *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090, 1092 (1896); "It is true that there was no formal seizure of the property, but a seizure of land in such a case is little more than a form * * *"; *Reed v. Reed*, 121 Ohio St. 188, 167 N.E. 684, 688 (1929): "From the standpoint of practical remedy it would be futile to require the seizure of land which cannot be removed from the jurisdiction," and *Benner v. Benner*, 63 Ohio St. 220, 58 N.E. 569 (1900). The leading decision holding in accordance with *Pennington* and *Pennoyer* that a seizure is necessary is *Matthews v. Matthews*, 247 N.Y. 32, 159 N.E. 713, 714 (1928), a decision of the New York Court of Appeals under Chief Judge Cardozo: "And it is not enough that at the time judgment is rendered he in fact has property within our jurisdiction. The right to dispose of it rests upon a prior seizure. Only so does the defendant receive notice that he has rights which should be protected. It must therefore appear, before a judgment is entered purporting to deal with a non-resident's property, that by attachment, by injunction, by sequestration in some manner, the court has laid hands upon his property within the State." Other decisions in accord with *Pennoyer* and *Pennington* are *Bray v. Landergren*, 161 Va. 699, 172 S.E. 252, 256 (1934): "* * * The Arlington County Court had authority to seize this property and to hold it subject to such judgment as it might pronounce in favor of the wife. Had that been done, no question as to the constitutionality of its proceedings could have been raised and the doctrine of *Pennoyer v. Neff* could have had no application, but 'seizure of the commencement of the proceedings' was essential and there was none. There was nothing in the nature of sequestration. In the instant case the property was not seized before judgment," *Carter v. Carter*, 147 Conn. 238, 159 A. 2d 173 (1960); *Gimbel v. Gimbel*, 147 Conn. 561, 163 A. 2d 451 (1960); *Keen v. Keen*, 191 Md. 31, 60 A. 2d 200 (1948); *Reschofsky v. Reschofsky*, 272 App. Div. 694, 74 N.Y.S. 2d 636 (1947); *Myers v. Myers*, 131 Misc. 318, 227 N.Y.S. 13, affd. 225 App. Div. 776, 232 N.Y.S. 825 (1928); *Feldman v. Feldman*, 189 Miso. 564, 72 N.Y.S. 2d 923, on rehearing 189 Misc. 565, 72 N.Y.S. 2d 390 (1947).

subjected to the satisfaction of the claim for alimony and child support." Appendix B hereto, p. 2.

This doctrine is simply that in *ex parte* divorce a "* * * seizure at the commencement of proceedings * * *" in order that, "* * * property may be brought under the control of the court * * *" is not required for the satisfaction of a personal claim for alimony from the non-resident's property, even though no pre-existing interest in the property is claimed.

Petitioner submits that the doctrine adopted by the Florida courts below is directly contrary to the constitutional principles established by this Court in *Pennoyer* and *Pennington.*

The doctrine is dependent upon the state court's continuing position that alimony is not a personal right, but is merely an incident of divorce, which may be granted as a matter of *in rem* status by the state of "marital domicile" without regard to the federal due process principles regarding *in personam* and *quasi in rem* property jurisdiction. Such subordination of due process requirements directly conflicts, in addition, with the principles firmly established by the recent decisions of this Court in the area of "divisible divorce." See cases cited p. 11 hereto, *supra.*

In these decisions, which have made clear that judgments of alimony are "personal judgments" within the meaning of *Pennoyer*, *Armstrong v. Armstrong*, 350 U.S. 568, 576 (concurring opinion of Mr. Justice Black, Douglas, Clark and the Chief Justice) this Court has never

lent support to the view taken below, that the due process requirement of *seizure*, may be ignored in the alimony aspect of *ex parte* divorce, where no pre-existing interest in the property is claimed.

In *Vanderbilt v. Vanderbilt*, supra, this Court approved a *quasi in rem* alimony and support decree, but specifically pointed out that:

> "The New York Court did not have jurisdiction over him, but in order to satisfy his obligations, if any, to Mrs. Vanderbilt, *it sequestered his property within the State.*" 354 U.S. at 417, 77 S.Ct. at 1362.

In its footnote to this proposition the Court cited *Pennington.* The New York trial court described the procedure there followed which Petitioner submits could have been but was not followed herein, and is substantially required by *Pennington* and *Pennoyer:*

> "* * * defendant was served by order of publication herein, and, on the same date that the order for publication was made, an order of sequestration was granted herein, directing the seizure by the receiver named of defendant's property within the State of New York; the receiver thereupon acquired custody and control of moneys and property of the defendant and is still holding such property and money." *Vanderbilt v. Vanderbilt*, 138 N.Y.S. 2d 222, 228 (Sup.Ct. N.Y. (1955).

The Florida statute authorizing constructive service

of process by publication, Ch. 48 Fla. Stat. (1967) authorizes such process:

"Section 48.01 * * *

(4) For divorce or annulment of marriage;

* * *

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ of process shall have been issued and executed so as to place any property, fund or indebtedness in custodia legis."

Thus, had a receiver been appointed and had possession been taken of the property, had the property been sequestered, or had the property been brought into the custody of the court in any legally sufficient manner, the Florida statute and the Due Process Clause of the Constitution of the United States would have been satisfied.

Judgments for alimony in *ex parte* divorce must be rendered in accordance with the same due process of law as that required for other "personal judgments."

The issue raised by the rule adopted below which dispenses with the essential federal due process requirement of "* * * seizure at the commencement of the action * * *" in *ex parte* divorce and alimony proceedings, is im-

portant, substantial, and worthy of examination by this Court.

It is submitted that in this case the Court is squarely presented with the issue and has the opportunity to either bring to an end the flouting of these principles by state courts, or to determine that these principles are no longer required by the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ of Certiorari was mailed first class, postage prepaid to Sibley, Giblin and Levenson, 605 Lincoln Road, Miami Beach, Florida and Barrett and Diliberto, 608 Ainsley Building, Miami, Florida, attorneys for Respondent, Margaret F. Morton, Thomas C. Britton, Dade County Attorney, Dade County Courthouse, Miami, Florida, attorney for the Sheriff of Dade County, and Mershon, Sawyer, Johnston, Dunwody and Cole, 1600 First National Bank Building, Miami, Florida, attorneys for Intervenor Chase Manhattan Bank this 2 day of January, 1968

ALLAN MILLEDGE